

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2008 Session

TORRIE D. JOHNSON v. JASON B. JONES, ET AL.

Appeal from the Circuit Court for Dickson County
No. CV 2385 George C. Sexton, Judge

No. M2007-02876-COA-R3-CV - Filed April 2, 2009

The trial court dismissed plaintiff's refiled negligence suit on the basis that it was barred by the applicable statute of limitations and was not subject to the Savings Statute, Tenn. Code Ann. § 28-1-105(a). Plaintiff appeals arguing that since plaintiff's counsel neglected to date the certificate of service on the non-suit order filed in her prior suit, the non-suit order was not effective. According to plaintiff, since the non-suit order was not effective, then the one-year period under the Savings Statute, Tenn. Code Ann. § 28-1-105(a) was extended. The dismissal is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Michael H. Sneed, Nashville, Tennessee, for the appellant, Torrie D. Johnson.

David S. Zinn, Brentwood, Tennessee, for the appellees, Jason B. Jones and Calvin Jones.

OPINION

The issue on appeal concerns the operation of Tenn. Code Ann. § 28-1-105(a), commonly known as the "Savings Statute." The facts are not in dispute. The plaintiff, Torrie Johnson, was a passenger involved in an automobile accident with Jason Jones in December of 2000. Ms. Johnson sued Jason Jones and his father, Calvin Jones, seeking damages arising from Jason Jones' alleged negligence.

On May 1, 2006, an Order of Voluntary Non-Suit was filed which dismissed Ms. Johnson's suit without prejudice ("Order"). The Order was approved for entry by Ms. Johnson's attorney by her signature and contained a Certificate of Service signed by Ms. Johnson's attorney showing that the order had been sent to defendants' counsel. Ms. Johnson's attorney, however, omitted the date on the Certificate of Service showing the date it was actually mailed to defendants' counsel.

Relying on the Savings Statute, Ms. Johnson later refiled her negligence action against Jason Jones and his father on May 3, 2007, more than a year after the Order of Voluntary Non-Suit was entered.

The defendants moved to dismiss Ms. Johnson's refiled negligence claim since it was barred by the statute of limitations applicable to negligence claims, Tenn. Code Ann. § 28-3-104(a)(1), and outside the one-year period allowed by the Savings Statute, Tenn. Code Ann. § 28-1-105(a). Ms. Johnson did not dispute that the limitations period governing her claim had expired. Instead, Ms. Johnson argued to the trial court that her suit was refiled within the one-year period allowed by the Savings Statute. This is true, according to Ms. Johnson, due to the defective Certificate of Service on the Voluntary Non-Suit Order.

The trial court found Ms. Johnson's suit was barred by the applicable statute of limitations and dismissed the case. Ms. Johnson appeals arguing her action is timely under the Savings Statute.

I. ANALYSIS

The Savings Statute, Tenn. Code Ann. § 28-1-105(a), provides in pertinent part as follows:

(a) If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

If one simply applies the plain language of Tenn. Code Ann. § 28-1-105(a), Ms. Johnson's action is not subject to the Savings Statute since she refiled her suit more than a year after the date of the voluntary non-suit. Consequently, her action is barred.

Ms. Johnson argues, however, that the omitted date on the Certificate of Service prevented the Order from being effective on May 1. Therefore, the Savings Statute did not begin to run until later, thus making her May 3 re-file date timely under the Savings Statute. According to Ms. Johnson, under Rule 58 of the Tennessee Rules of Civil Procedure, the Order was not effective until the Order was filed in court with a notice it was served on all parties of record. She argues that the omitted date nullified the required notice to all parties. Rule 58 provides three ways for an order to be effective.

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge and all parties or counsel, or

(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Following entry of judgment the clerk shall make appropriate docket notations and shall copy the judgment on the minutes, but failure to do so will not affect validity of the entry of judgment. When requested by counsel or pro se parties, the clerk shall forthwith mail or deliver a copy of the entered judgment to all parties or counsel. If the clerk fails to forthwith mail or deliver, a party prejudiced by that failure may seek relief under Rule 60.

The requirements of Rule 58(2) were met. Clearly, Ms. Johnson's attorney received the Order of Voluntary Dismissal since she approved it for entry and signed the Certificate of Service. Furthermore, the Certificate signed by Ms. Johnson's attorney certifies that a copy was sent to defendants' counsel. It is simply unclear the date it was mailed. Defendants' counsel submitted an affidavit to the trial court attesting to the fact that he received both an unsigned copy and a signed filed copy of the Order. Consequently, the requirements of Rule 58 were met. Furthermore, it would not be appropriate for Ms. Johnson to reap a benefit caused by the error of her attorney at defendants' expense.

Alternatively, Ms. Johnson argues that under Rule 6.05 of the Tennessee Rules of Civil Procedure, she has three additional days to file her suit. Rule 6.05 provides "[w]henver a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail, three (3) days shall be added to the prescribed period." Rule 6.05 does not apply here since the Savings Statute does not begin to run upon service of notice.

The dismissal is affirmed. Costs of this appeal are assessed against the appellant, Torrie D. Johnson, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.